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ENGLISH TRANSGENDER LAW REFORM AND THE *SPECTRE* OF CORBETT

ABSTRACT. This article will provide a critique of two recent English marriage law decisions, the first concerning a (female to male) transgender man and the second a (male to female) intersexed woman. It will do so through consideration of the dialogue between each and the landmark transgender case of *Corbett* v. *Corbett*. It will highlight how both decisions, in seeking to minimise the fact of 'departure' from *Corbett*, serve to reproduce key elements of that decision which serve to undermine the future prospects for transgender law reform in the English context. In particular, both decisions, in different ways, or with different emphases, ensure that 'legal sex' continues to be determined by (bio)logical and temporal factors. Crucially, however, as in *Corbett*, it is legal anxiety over the boundaries of the 'natural', and the homophobia of law, that underscores this anxiety, that account for these particular constructions of 'legal sex'.

KEY WORDS: biological science, homosexuality, intersex, marriage, nature, sexual capacity, transgender

INTRODUCTION

This article will provide a critique of judicial (re)constructions of sex in the context of two recent English marriage law decisions, *S.-T. (formerly J.)* v. *J.*[1] and *W.* v. *W.*[2] The first case, involved J., a (female to male) pre-operative transgender man, and the second W, a (male to female) intersexed woman. It should be emphasised from the outset however that distinguishing between transgender and intersex cannot be reduced to a purely descriptive act. While it proved critical in the case of W, the distinction, as we shall see, proves to be an effect of medico-legal constructions of (bio)logical sex and judicial concerns over demarcating the realm of the 'natural'. The distinction is also misleading in that it belies the capacity of the term transgender, and a developing transgender politics, to include non-binary sex differences.[3] The article will situate each case within the

[1] *S.-T. (formerly J.)* v. *J.* [1998] 1 All E.R. 431.

[2] *W.* v. *W.* [2000] The Times 31 October (Transcript) 1.

[3] The term *transgender* is a term of the 1990s. It reflects the emergence of new communities, greater visibility of their members and, to some extent, an uncoupling of

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contexts of transgender law reform and wider gay and lesbian and feminist politics.

As I have argued elsewhere (Sharpe, 1997), in those common law jurisdictions that have proceeded along a law reform path that recognises the sex claims of transgender people, the medico-legal conditions of that recognition have consistently undermined the position of non or pre-operative transgender people, gay men and lesbians and women. Through instantiating a pre/post surgical dyad and coupling surgery (sacrifice) with transgender 'authenticity' non- and pre-surgical transgender people have had their lives trivialised and have been placed at the margins of law reform. In defining transgender in opposition to homosexuality, and through viewing sex reassignment surgery as the culmination of a process that heterosexualises bodies, law diminishes gay men and lesbians and in the case of non-heterosexual transgender people renders their desires and sexual practices 'unthinkable'. Legal recognition has also presented a challenge to feminism in a number of respects. In particular, medico-legal constructions of the 'passing' woman[4] and the requirement of sex reassignment surgery serve to deny the central feminist tenet that anatomy does not determine destiny (de Beauvoir, 1953).

The two recent English decisions reproduce all these concerns. However, through considering the particular forms of legal reasoning adopted we shall see that they do so in different ways, ones that are, perhaps, more troubling. In contrast to cases in the United States, Australia,

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life journeys from medical regulation. In the early 1990s, the term was utilised to name a multiplicity of gender experiences that lay between the medically imposed categories of *transvestite* and *transsexual*. It sought to capture and respect gender identities irrespective of a desire for sex reassignment surgery and/or hormonal treatments. The term *transgender* has also been used, and increasingly so, as an umbrella term to include all persons who cross gender boundaries, from post-operative self-identified transsexual and intersexed persons to the episodic cross-dresser. Further, in addition to capturing persons who wish to 'move' from one sexed position to the 'other', the term includes those who lie between binary constructions of sex, who occupy middle ground or a third (fourth, fifth . . .) sex/gender space. However, it should not be thought that the term is fixed or that there is an overriding consensus as to its meaning at the community level. For a discussion of trans terminology in the 1990s see Bolin (1988); Feinberg (1992, 1993) Bornstein (1994); The Sydney Gender Centre (1994); Tranys With Attitude (1994); Nataf (1996); Wilchins (1997); Califia (1997); Cromwell (1999); Whittle et al. (1999).

[4] In considering the suitability of candidates for surgery 'appropriate' gender performance has proved an important factor. See here Raymond (1979); Billings & Urban (1982); Bolin (1988); Birrell & Cole (1990); King (1993); Lewins (1995); Griggs (1998); Kaveney (1999). 'Appropriate' gender performance within the medical arena would, in the case of the (male to female) transgender woman, appear to require the performance of a stereotypical and conservative femininity. In this latter respect 'appropriateness' is perhaps inflected through a middle-class gaze (see Tyler, 1991, p. 57).

and New Zealand that have recognised the sex claims of post-operative transgender persons for a variety of legal purposes, including marriage, and have done so on the basis of a not unproblematic view that sex reassignment surgery effects 'psychological and anatomical harmony',[5] the English decisions proceed on a different basis, insisting that birth, as a temporal moment, governs sex determination. Accordingly, the emergence of an English approach to law reform, while benefiting intersexed, and possibly some transgender, people, requires more than the 'mere' resculpting of bodies. Rather, it ties the possibility for sexual and gendered becomings to anatomical and/or biological 'facts' determined at birth.

However, it should not be thought that *S.-T. (formerly J.)* v. *J.* and *W.* v. *W.* thereby represent merely two more decisions in a line of unbroken English authority decided in the wake of the landmark English decision of *Corbett* v. *Corbett*[6] which decided that "sex is determined at birth" and by a congruence of chromosomal, gonadal and genital factors. On the contrary, and despite judicial attempts to minimise the violence done to the reasoning in *Corbett*, the two recent decisions represent subtle, though different kinds of, 'departure'. The significance of these 'departures' however lies not in the prospect of more thorough going reform in the English context but rather in the way that they redraw attention to the stranglehold *Corbett* continues to exert over the English judiciary. Thus, *S.-T. (formerly J.)* v. *J.* and *W.* v. *W.* reproduce the temporal dimension

[5] See, e.g., *Re Anonymous* [1968] 293 N.Y.S. 2d 834; *M.T.* v. *J.T.* [1976] 355 A. 2d 204; *R.* v. *Harris and McGuiness* [1989] 17 N.S.W.L.R. 158; *Secretary, Department of Social Security* v. *S.R.A.* [1993] 118 A.L.R. 467; *M.* v. *M.* [1991] N.Z.F.L.R. 337; *Attorney-General* v. *Otahuhu Family Court* [1995] 1 N.Z.L.R. 603. This medico-legal view of psychological and anatomical 'conformity' or 'harmony' is, of course, a problematic one. It views phallic women and vaginaed men to be disharmonious, existing in a state of limbo. Yet, for many transgender persons anatomy and psychology are harmonious even though, and precisely because, their coupling is located outside either sphere of medico-legal binary divisions of sex (see generally above note 3).

[6] *Corbett* v. *Corbett* [1970] 2 All E.R. 33. The decision has been subject to sustained academic criticism. See *e.g.*, Green (1970); David (1975); Samuels (1984); Dewar (1985); Taitz (1986). For a feminist critique of the decision and of transgender jurisprudence more generally see, *e.g.*, O'Donovan (1985); Collier (1995); Coombes (1998). Despite criticism, *Corbett* has been consistently followed by English courts (see *Dec C.P. 6/76* National Insurance Commissioner Decisions; *E.A. White* v. *British Sugar Corporation* [1977] I.R.L.R. 121; *Social Security Decision numbers R. (P.) 1 and R. (P.) 2* [1980] National Insurance Commissioner Decisions; *R.* v. *Tan* [1983] Q.B. 1053; *Peterson* v. *Peterson* [1985] The Times 12 July; *Franklin* v. *Franklin* [1990] The Scotsman, 9 November; *Collins* v. *Wilkin Chapman* [1994] E.A.T./945/93 (Transcript). Indeed, as recently as November 2000, an English court has insisted that despite marked change in social attitudes since *Corbett* the test formulated in that decision by Ormrod J. continues to govern the legal determination of sex (*Bellinger* v. *Bellinger and another* [2000] 2 All E.R. (D) 1639).

of *Corbett*. That is to say, the notion that birth is the critical moment for determining sex persists in these decisions. Further, while the precise configuration of factors to be taken into account at the birth moment differ, the two recent decisions, like *Corbett*, resort to (bio)logic. More significantly, however, all these decisions find unity in legal anxiety over the boundaries of the 'natural' and in the homophobia that generates it. It is legal concern over the 'natural' and the homophobia of law that structures these decisions. In this respect, resort to (bio)logic emerges as rhetorical trope.

Before turning to consider *S.-T. (formerly J.)* v. *J.* and *W.* v. *W.* it is first necessary to consider *Corbett* and to clarify particular aspects of the legal reasoning employed by Ormrod J. in that landmark decision. This is especially important given that both judges and commentators often equate *Corbett* with chromosomal sex. It is important too because *Corbett*, like the two recent decisions, involved issues of marriage. A return to *Corbett* is also necessitated by the centrality of the decision within transgender jurisprudence. It represents the point from which legal thinking on the subject of sex determination begins. To think legal sex is to think of, through, against, and/or beyond this primal scene. This is so, even in those jurisdictions that have abandoned the *Corbett* test in favour of a test of 'psychological and anatomical harmony'. In the English context however, as we shall see, the judiciary have been reluctant to abandon *Corbett*, preferring either to following it without question or to rearticulate Ormrod J.'s legal reasoning in terms of its own logic. To adopt this latter approach, evident in the two recent decisions to be considered, is to locate legal reasoning within the labyrinthine structure of *Corbett* from which there is, in the end, no escape.

1. REINTERPRETING *CORBETT*

In *Corbett* v. *Corbett*, a case concerning the validity of a marriage between a biological male petitioner, Arthur Corbett, and a (male to female) transgender woman respondent, April Ashley, Ormrod J. held that "sex is determined at birth" and by a congruence of chromosomal, gonadal, and genital factors.[7] Accordingly, April Ashley, whose chromosomes, gonads, and genitalia were congruent at birth, was determined to be a male person. However, a simple restatement of this proposition for which *Corbett* now represents authority reveals little about Ormrod J.'s legal reasoning. It suggests some sort of axiomatic statement about (bio)logical 'truth'. Yet,

[7] *Supra* n. 6, 48.

as we shall see, Ormrod J.'s (bio)logic amounts to little more than legal play with the intricacies of medical science. Before pursuing this theme it is first necessary to situate the case within its appropriate context, one that clearly caused Ormrod J. considerable anxiety.

In his judgment Ormrod J. made it clear that he was not determining the "legal sex" of April Ashley at large, but only within the context of marriage. It was within the context of marriage, an institution in which "the capacity for natural heterosexual intercourse is an essential element"[8] that the legal test for determining sex emerged as (bio)logically and temporally specific. In order to understand *Corbett* it is important not to divorce this concern from the ostensible scientificity of the test formulated. While April Ashley had undertaken sex reassignment surgery so that she possessed female genitalia and the capacity for heterosexual intercourse, Ormrod J. chose to characterise such intercourse as 'unnatural'. Considering her vagina, he described it as an "artificial cavity"[9] incapable of "ordinary and complete intercourse"[10] or, and in a reference to Dr. Lushington's famous nineteenth century dictum, "vera copula of the natural sort of coitus".[11] Further, it is this anxiety over the realm of the 'natural' which led Ormrod J. to conflate post-operative transgender sexual practice with homosexuality: "When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres".[12]

It is the construction of April Ashley's vagina as the locus of the 'unnatural' and its perceived proximity to homosexuality that is, perhaps, the most revealing aspect of Ormrod J.'s judgment. Moreover, it is not the case that the 'unnaturalness' of April Ashley's post-operative body is simply to be read off the fact that her chromosomes, gonads, and genitalia were male at birth. This is clear from Ormrod J.'s willingness to assume April Ashley to be a woman for the purpose of considering the alternative ground of

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8 *Ibid*.

9 *Supra* n. 6, 49.

10 *Ibid*.

11 *Ibid.* The source of Dr Lushington's famous nineteenth century dictum is the case *of D.-e.* v. *A.-g. (orse. D-e)* [1845] 1 Rob. Eccl. 279; 163 ER 1039; 27 Digest (Rep.) 273, 2187.

12 *Supra* n. 6, 49. While transgender/homosexual conflation in this passage is tied to an analysis of sexual practice, elsewhere in his judgment Ormrod J. presents April Ashley's 'homosexuality' as identity. For an appreciation of judicial understandings of the gay male body, and law's straddling of the act/identity dyad in this context, see Moran (1996, especially Chapter 2) and Stychin (1995). The word 'crural' pertains to the leg. While Ormrod J. used the prefix 'intra' (within) the phrase 'intra-crural' refers to sexual intercourse occasioned through or between the thighs.

petition, namely the question of consummation. In other words, it is the 'unnaturalness' of her vagina that proves crucial. The implication of this move appears to be that the vagina of a chromosomal female might also be a locus for the 'unnatural'.

However, in the earlier decision of *S.Y.* v. *S.Y. (orse W.)* the English Court of Appeal had held that where a wife lacked a natural vagina but could be given an artificial one by surgical intervention then coitus by means of that artificial vagina constituted *vera copula*, so as to consummate a marriage.[13] In coming to this conclusion Willmer L.J. took the view that Dr Lushington's famous dictum, while being a statement of commanding authority, had to be interpreted in the context of considerable twentieth century advances made in medical science.[14] In a far from satisfactory manner, Ormrod J. distinguished the facts of *S.Y.* v. *S.Y.* from those of *Corbett* on the basis that S.Y.'s surgery was performed on a vagina that was 'abnormal' ('naturalisation') rather than on a body where a vagina was wholly absent as in the case of April Ashley ('denaturalisation').[15] It would seem therefore that Ormrod J. comprehended the 'naturalness' of the vagina in terms of degree. Yet, perceiving that such an understanding of the vagina posed a threat to the institution of marriage he expressed the view that "by over-refining and over-defining the limits of 'normal' one may, in the end, produce a situation in which consummation may come to mean something altogether different from normal sexual intercourse".[16]

In returning to Ormrod J.'s triumvirate of factors for determining sex it must be emphasised that, while all of the nine medical experts called to give evidence in the *Corbett* case agreed on the importance of those factors, they were not the only factors mentioned. In particular, several experts, including Professor Harris, placed emphasis on hormonal sex.[17] Indeed, Professor Harris contended that it would be appropriate to classify as intersex a person whose hormones at birth were incongruent with the three factors selected by Ormrod J.[18] While Ormrod J. rejected the suggestion that hormonal factors may have accounted for April Ashley's transsexualism it is less clear why he excluded hormones from the test formulated. The reason he offered at the time was that contentions regarding sex hormones were "purely hypothetical and speculative".[19] However, in a

13 *S.Y.* v. *S.Y. (orse W.)* [1962] 3 All E.R. 55.
14 *Ibid*.
15 *Corbett*, *supra* n. 6, 50.
16 *Ibid.*
17 *Corbett*, *supra* n. 6, 43.
18 *Ibid*.
19 *Ibid*.

move that seemingly anticipates developments in this area of medical science, Ormrod J. negated future argument around hormones through articulating a position on 'incongruency'. That is to say, while chromosomal, gonadal, and genital 'congruence' will be determinative of the issue of legal sex, Ormrod J directed his mind to situations where such 'congruence' is lacking. He expressed the view that where these three factors did not reinforce one another the genital factor should be determinative:

> The real difficulties, of course, will occur if these criteria [chromosomal, gonadal and genital] are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to follow from what I have said that the greater weight would probably be given to the genital criteria than to the other two.[20]

This view, of course, serves to redraw our attention to the marriage context of the case and to Ormrod J.'s evident anxiety over the realm of the 'unnatural'. For it is the genital factor, and the genital factor alone, that is invoked through an emphasis on the 'capacity for natural heterosexual intercourse'. Through scripting birth as the moment for determining sex and through privileging the genital factor in the absence of 'congruity', the *Corbett* decision attempts to insulate marriage from contamination by the 'unnatural'. The multiple references to homosexuality and the conflation between transgender and homosexuality in Ormrod J.'s judgment are explicable in this regard (Sharpe, 2000). As we shall see, it is this underlying concern as well as the formal test enunciated by Ormrod J. that informs the approaches taken in *S.-T. (formerly J.)* v. *J.* and *W.* v. *W.*

2. *S.-T. (FORMERLY J.)* V. *J.*

The case of *S.-T. (formerly J.)* v. *J.* raises the possibility that the re-sexing of transgender bodies may occur at common law, rather than requiring statutory intervention[21] or successful appeal to the European Court of Human

[20] *Supra* n. 6, 52.

[21] There have been attempts to introduce legislation recognising the sex claims of transgender people. On 2 February 1996, Alex Carlile's Private Members' Bill (Gender Identity (Registration and Civil Status) Bill 23), which would have produced precisely this effect, failed in the House of Commons when time for its debate expired. The fact that Bills of this kind tend to be introduced as Private Members' Bills in the U.K. context makes their enactment less likely. This can be contrasted with the Australian experience. For example, the Transgender (Anti-Discrimination and Other Acts Amendment) Act (N.S.W.) 1996 (which amongst other things provided for recognition of the sex claims of post-operative transgender people) was introduced and supported by the New South Wales Labor government.

Rights.[22] This is perhaps especially significant given that common law resistance to recognition of transgender sex claims has been particularly pronounced in relation to marriage.[23] However, the judicial re-imagination of transgender bodies that is apparent in *S.-T. (formerly J.)* v. *J.* is, as we shall see, not without its own difficulties. Moreover, these difficulties reveal significant continuities with the *Corbett* decision.

The facts of the case were that J., a (female to male) transgender man, who had undergone a bilateral mastectomy and had received hormone injections, went through a ceremony of marriage with a biological woman, S.-T., without informing her of his transgender status.[24] In fact, J.'s declaration that there was no impediment to the marriage was viewed by the court as a positive statement to the contrary.[25] After seventeen years, and on the application of S.-T., the marriage was declared null and void under section 11(c) of the Matrimonial Causes Act 1973, on the ground that at the time of the marriage the parties were not respectively male and female. The defendant, J., while not challenging that finding, applied for ancillary relief under the Act. It was the merits of this application that both the trial judge and, on appeal, the Court of Appeal had to determine. In dismissing the defendant's appeal the Court of Appeal held that:

> [J.] had committed a serious crime: he had deceived the plaintiff into the marriage and, in doing so, had placed himself in a position where he had the opportunity to apply for a wide range of relief which would not otherwise have been open to him. His conduct at the time of the marriage, when judged by principles of public policy, brought down the scales overwhelmingly against the grant of relief.[26]

In evaluating J.'s conduct in public policy terms, the Court of Appeal noted that there was "a present public interest in buttressing and protecting

[22] So far, the European Court of Human Rights has been prepared to follow the analysis laid down in *Corbett* with regard to cases brought against the U.K. (see *U.K.* v. *Rees* [1986] 9 E.H.R.R. 56; *U.K.* v. *Cossey* [1991] 13 E.H.R.R. 622; *X., Y. and Z.* v. *U.K.* [1997] E.H.R.R. 143; *Sheffield and Horsham* v. *U.K.* [1998] 2 F.L.R. 928). Moreover, unlike the European Court of Human Rights, the English courts, should they decide to depart from *Corbett*, will not be fettered by the consideration of a state's 'margin of appreciation' which has proved to be a considerable obstacle to transgender law reform at the European level. On the other hand, and in contrast to United States and Australasian case law, consideration of human rights has not been a feature of English transgender jurisprudence.

[23] Indeed, in the Australian context where judicial recognition has been forthcoming, the courts have gone to great lengths to insulate the institution of marriage from the effects of their decisions (see *R.* v. *Harris and McGuiness* [1989] 17 N.S.W.L.R. 158; *Secretary, Department of Social Security* v. *S.R.A.* [1993] 118 A.L.R. 467).

[24] *S.-T. (formerly J.)* v. *J.*, *supra* n. 1, 431.

[25] *Ibid*.

[26] *Ibid*., 432. The crime J. was found to have committed was the crime of perjury (section 3 of the Perjury Act 1911).

the institution of marriage".[27] Like the trial judge, Hollis J., the Court of Appeal took the view that the deception perpetrated by J. against S.-T. went to "the heart of marriage"[28] given that "single sex unions remain proscribed as fundamentally abhorrent to [the] notion of marriage".[29] The horror that the perception of homosexuality within marriage evokes is also apparent in the extensive list of deceptions, including the potentially lethal non-disclosure of H.I.V./A.I.D.S., in relation to which Ward L.J. expressed the view that he "would be very slow to allow an appeal to public policy striking out a claim for ancillary relief".[30] The view of the marital union between S.-T. and J. as a "legal impossibility"[31] appears to be premised on a view of J.'s body as pre-operative or as still in transition. That is to say, it is the fact that J.'s body lacked a penis that assumes importance in law's characterisation of his relationship with S.-T. as a 'single sex union'. This becomes especially clear in the contrast drawn between the post-operative body and J.'s body as one that "denied him the fulfillment of his desire".[32] It is also apparent in the contrast drawn between J.'s body and that of "a 'full blooded' male".[33] Here the pre-operative female to male body, or more specifically the vaginaed male body, is, and can only be, read as 'female' and 'lesbian'. This conflation of transgender with homosexuality is, as Marjorie Garber has suggested, fuelled by a "desire to tell the difference, to guard against a difference that might otherwise put the identity of one's own position in question" (Garber, 1992, p. 130). This, highly problematic, legal inscription of homosexuality onto the body of J. serves to undermine his sex claims in the marriage context and indeed the claims of all transgender persons who have not undergone phalloplasty or vaginoplasty.[34]

Judicial anxiety over homosexuality is also evident in the court's assessment of whether a particular crime, in this case perjury, had crossed the

27 *Supra* n. 1, 465.

28 *Ibid*., 442.

29 *Ibid*., 465.

30 *Ibid*., 466.

31 *Ibid*., 450.

32 *Ibid*., 458.

33 *Ibid*., 436.

34 Phalloplasty refers to the surgical construction of a penis and vaginoplasty to the surgical construction of a vagina. Moreover, a requirement for sex reassignment surgery operates differentially across gender. That is to say, at present, surgical techniques for performing phalloplasty are not nearly as developed or successful as those for vaginoplasty. Accordingly, a transgender jurisprudence fixated on genitalia, not only excludes pre- or non-surgical transgender people in general but has the additional effect of marginalising (female to male) transgender people in particular and the claims they might make upon law.

threshold of seriousness thereby invoking the principle of public policy and barring ancillary relief. One factor considered to be relevant in such an assessment was "the effect [perjury had] on the other party".[35] One unchallenged finding of the court in this respect was that the effect on S.-T., who had stated that "I am not into women"[36] or words to that effect, had been "catastrophic and that she has been traumatised by the experience".[37] The willingness of the court to accept that S.-T. was, for the 17 years of her marriage to J., unaware of his transgender status is, at least in part, an effect of the homophobia of law. That is to say, the court refused to see homosexuality from a perspective internal to the marriage. It is not only S.-T. who saw "only what she wanted to see and what she expected" as one medical expert put it.[38] Rather, law too averts its eyes until, consequent on the breakdown of the marriage, S.-T., and therefore heterosexuality itself, has reached a safe distance from the horror of a 'single sex union'. In this regard the court's emphasis on 'fraud' and 'deception' not only addresses considerations of desert but also serves the psychological purpose of insulating 'heterosexual' identity within marriage from homosexual contamination. Moreover, the court not only denied J. heterosexual male status. Rather, in declaring J. guilty of perjury, of knowingly and willfully making a false declaration for the purpose of procuring a marriage,[39] the court casts doubt as to the 'authenticity' of any belief in such status that the vaginaed man may harbour. In a similar vein, Ward L.J. expressed the view "I cannot accept that in his heart of hearts . . . [J] . . . did not know that his body did not conform with what he desired for it".[40] Here the vaginaed male body as harmonious, complete and heterosexual lies beyond the judicial imagination.

However, the negation of the sex claims, and the homosexualisation, of the pre-operative body serve as prelude to the moment of departure from *Corbett*. That is to say, the depiction of the pre-operative body as monstrous, as an "ambiguous condition to which [J.] is condemned",[41] serves to reduce judicial anxiety with regard to the re-sexing of the post-

35 *S.-T. (formerly J)* v. *J.*, *supra* n. 1, 479.

36 *Ibid*., 439.

37 *Ibid*., 456. Judicial concern over the effect of this type of 'deceit' on the sexual identity of the 'deceived' party is particularly notable in the criminal law cases of Jennifer Saunders (*R.* v. *Saunders*, unreported, Pink Paper, 196, 12 October 1991) and Sean O'Neill (*State of Colorado* v. *Sharon Clark (aka Sean O'Neill)* Unrep). For a discussion of these cases see Califia (1997, pp. 234–237).

38 *Supra* n. 1, 440.

39 *Ibid*., 452–454.

40 *Ibid*., 458.

41 *Ibid*., 467.

operative body that the court subsequently imagines. While it is clear from the decision that the bodies of vaginaed men and phallic women emerge as constitutive 'outside' to any legal (re)imagination of sex, the court does anticipate future departure from *Corbett* along genital lines. Indeed, while the majority of the court took the view that it was "neither necessary nor appropriate ... to rule or even to speculate whether *Corbett* v. *Corbett* remains good law",[42] given the absence of any challenge by J. as to the finding that he was female, the court, in a series of *obiter* statements, re-imagined sex along precisely these lines. This is especially evident in the judgment of Ward L.J. In referring to the New Zealand marriage case of *Attorney-General* v. *Otahuhu Family Court*,[43] and in contrast to the trial judge, he expressed the view:

> For my part, I find myself unable lightly to dismiss it. Taken with the new insight into the aetiology of transsexualism, it may be that *Corbett* v. *Corbett* would bear re-examination at some appropriate time. For present purposes, it should, however, be stressed that ... declaration of validity will only apply in a case where there has been 'physical conformation' to the desired sex by full reconstructive surgery, including in the case of a female to male transsexual, surgical construction of a penis. For that reason the decision does not assist [J].[44]

This passage is revealing in a number of respects. First, it is perhaps significant that a superior English court, against the backdrop of *Corbett*, and while not being required to determine the question of sex, proved capable of re-imagining sex uncoupled from chromosomes and did so within the marriage context. That is to say, Ward L.J. entertained the possibility of endorsing the test of 'psychological and anatomical harmony', a legal test already adopted in common law jurisdictions in the United States, Australia, and New Zealand.[45] Moreover, while Ward L.J. found *Attorney-General* v. *Otahuhu Family Court* to be a persuasive authority, it is important to note that Ellis J., in *Otahuhu*, did not merely endorse the test of 'psychological and anatomical harmony' with its requirement of genital reassignment surgery. Rather, and despite the considerable emphasis placed on post-operative heterosexual capacity within prior reform jurisprudence,[46] he went on, and in the only passage Ward L.J.

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[42] *Ibid*., 450, although Potter L.J. concluded that *Corbett* was good law.

[43] *Attorney-General* v. *Otahuhu Family Court* [1995] 1 N.Z.L.R. 603. See also *M.* v. *M.* [1991] N.Z.F.L.R. 337, which was the case that prompted the Attorney-General's application in *Otahuhu*.

[44] *S.-T. (formerly J.)* v. *J.*, *supra* n. 1, 447.

[45] See *supra* n. 5.

[46] See *e.g*., *Re Anonymous* [1968] 293 N.Y.S. 2d 834; *M.T.* v. *J.T.* [1976] 355 A. 2d 204; *M.* v. *M.* [1991] N.Z.F.L.R. 337; *Re the Estate of Marshall G. Gardiner* [2001] Kan App LEXIS 376.

chose to cite, to insist that post-operative sexual functioning was immaterial to the question of legal recognition for the purposes of marriage.[47] In his judgment Ellis J. focused not on sexual capacity but on a more minimal, and aesthetic, requirement that the genitalia of the unclothed transgender body appear congruous with that body's re-sexed classification.[48] Specifically, Ellis J. contended that while "in order to be capable of marriage two persons must present themselves as having what appear to be the genitals of a man and a woman"[49] they did not "have to prove that each can function sexually"[50] for "there are many forms of sexual expression possible without penetrative sexual intercourse".[51] In view of the fact that Ward L.J. did not qualify or comment adversely on this most permissive aspect of Ellis J.'s judgment, the decision of *S.-T. (formerly J.)* v. *J.* might be viewed as particularly encouraging for the future of English transgender jurisprudence when the 'appropriate time' comes.

However, for present purposes what is important is the insight that this shift from heterosexual function to bodily aesthetics offers regarding the purpose of sex reassignment surgery as legally comprehended. While an aesthetic concern over bodies is a consistent theme of transgender jurisprudence it is usually masked, at least partially, by a preoccupation with heterosexual capacity. Absent a concern over sexual functioning however law's view of phallic female and vaginaed male bodies as 'monstrous' becomes all the more evident as does the homosexual sign they emit in the legal imaginary. In this regard the decision and its endorsement by Ward L.J. in *S.-T. (formerly J.)* v. *J.* calls into question, at least within transgender contexts, the privileging of heterosexual penetration within feminist legal scholarship.[52] It is not my intention here to deny that legal discourse generated around vaginal capacity has effects, ones that need to be contested. Rather, I want to suggest that legal anxiety generated around transgender bodies may have more to do with transgender/homosexual conflation than with the production of penetrable bodies. For the decision in *Otahuhu* is directed less toward heterosexual obligation than to the prohibition of 'unnatural' (homo)sexual practices which 'non-complementary' bodies suggest. That is to say, law's re-sexing practices are perhaps premised on the absence rather than the presence of particular forms of sexual practice. Indeed, it may be that in light of *Otahuhu* prior reform juris-

47 *Attorney-General* v. *Otahuhu Family Court*, *supra* n. 43, 612.
48 *Ibid*., 607, 615.
49 *Ibid*., 612.
50 *Ibid*.
51 *Ibid*., 615.
52 See *e.g*., Collier (1995); Coombes (1998); Robertson (1998); Robson (1998).

prudence placing emphasis on heterosexual capacity can itself be read in terms of the 'naturalisation' of bodies rather than the actualisation of function. Anxiety over an imagined scene of homosexual congress is apparent in another respect. In the sole passage of Ellis J.'s judgment that Ward L.J. chose to cite, and found himself 'unable lightly to dismiss', Ellis J. expressed concern that legal failure to reclassify the sex of the post-surgical transgender body enabled marriages which "to all outward appearances ... would be homosexual marriages".[53] In this regard legal recognition emerges as a strategy to insulate marriage from contamination by the homosexual body. In refusing to recognise the fact of sex reassignment surgery law is, on this reading, implicated in hindering the 'heterosexualisation' of transgender bodies.[54]

In *S.-T. (formerly J.)* v. *J.* however, and in contrast to *Otahuhu* and reform jurisprudence generally, satiation of legal desire to 'naturalise' transgender bodies and genital sites requires more than the 'mere' fact of full sex reassignment surgery. Thus Ward L.J.'s view "that *Corbett* v. *Corbett* would bear re-examination at some appropriate time" proves dependent on more than the persuasiveness of the reasoning of Ellis J. in *Otahuhu*. Rather, Ward L.J. placed considerable emphasis on "new insight into the aetiology of transsexualism", a concern that was absent in the judgment of Ellis J. and given little weight generally within reform jurisprudence. Indeed, this emphasis on aetiology can be contrasted with the transgender jurisprudence of the European Court of Human Rights. While the European Court has emphasised the need to keep scientific developments under review, its resolution of transgender sex claims has tended to flow more from a concern with the 'margin of appreciation' enjoyed by States than with causal questions.[55] Moreover, (bio)logical science has been viewed as irrelevant to the determination of sex by a growing number of the European Court's judges who have dissented regarding the rejection of transgender sex claims.[56] In *S.-T. (formerly J.)* v. *J.*, Ward L.J. placed weight on contemporary scientific studies conducted post mortem that contend that genetically male transgender persons possess a female brain structure. Such studies support the hypothesis that gender identity develops as a result of an interaction of the developing brain and sex hormones (see Zhou et al., 1995; Kruijver et al., 2000). Indeed, Dr. Swaab

[53] *Attorney-General* v. *Otahuhu Family Court*, *supra* n. 43, 629.

[54] For a discussion of this theme, see Sharpe (1998).

[55] *Supra* n. 22.

[56] See, *e.g.*, the dissenting judgment of Martens J. in *Cossey*, *supra* n. 22 and the joint partly dissenting judgment of Bernhardt, Thor Vilhjalmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu J.J. in *Sheffield and Horsham*, *supra* n. 22.

and other medical experts engaged in this type of research have concluded that "transsexuals are right in their belief that their sex was wrongly judged at the moment of birth" (Zhou et al., 1995, p. 69). Such a view serves to problematise Ormrod J.'s analysis, predicated as it is on the reduction of sex to a triumvirate of chromosomes, gonads, and genitalia and the rejection of the view that transsexualism might have an organic basis.[57]

The emphasis on 'new insight into the aetiology of transsexualism' is significant in a number of respects. In the first place, a judicial focus on 'advances' in medical science enabled Ward L.J. to characterise an anticipated future departure from *Corbett* as consistent with the underlying scientific tenor of that landmark decision, rather than as a fundamental and violent departure from it. That is to say, the deployment of science assisted in the portrayal of law as logical, rational and coherent. The emphasis on new research regarding the aetiology of transsexualism is also significant in that it is indicative of a consistent, yet troublesome, approach to transgender law reform in the U.K. context.[58] While, in a jurisdiction that has consistently refused to recognise transgender sex claims, it is understandable that law reform has relied heavily on the legitimising effects of (bio)logical science, there are dangers in this strategy. First, it exposes transgender people to pathologisation of the body.[59] Second, it concedes birth as the governing moment in sex determination. Reform on these terms maintains the temporal specificity of *Corbett* intact thereby circumscribing the future legal possibilities of transgender people who are unable to link their sex claims to the womb. This attempt to impose being on the fact of becoming (see Foucault, 1982) challenges feminist politics

[57] *Corbett*, *supra* n. 6, 43–44.

[58] This approach has been relied on heavily by English transgender litigants before the European Court of Human Rights (*supra* n. 22). Moreover, considerable reliance was placed on the mysteries of the hypothalamus in the U.K. parliamentary debates surrounding the aborted Gender Identity (Registration and Civil Status) Bill (1996); see the Hon Mr Alex Carlile, Hansard Parliamentary Debates (House of Commons) 2 February 1996, pp. 1282–1283.

[59] Moreover, the dangers of resorting to (bio)logic in the aid of law reform are not new ones. In the modern context this strategy is perhaps traceable to the sexological writings of Ulrichs in the 1860s (see Ulrichs, 1994, 1898; Kennedy, 1981, 1998). Ulrichs argued for a congenital, as distinct from a hereditary, base for Uranian desire in order to make a case for natural variation in human sexuality (Ulrichs, 1994, p. 36). The figure of the Uranian, while subsequently conflated with homosexuality, describes a broad (trans)gender phenomenon of which same-sex sexual desire is only an indistinct aspect (see Prosser, 1998, p. 138). The dangers of Ulrichs' move are evident in the writings of many of his sexological successors, particularly Krafft-Ebing, who converted Ulrichs' view of Uranian desire into a pathology inhering within the body (Krafft-Ebing, 1894). Marginalised groups are perhaps always vulnerable to this sort of reinscription whenever claims are tied to (bio)logic.

because it represents a moment in the ossification of the gender order. Moreover, reliance on (bio)logic may serve to fuel a desire to eradicate 'deviant' people altogether. While the idea of fixed identity is seen by some as offering "resistance to the social-engineering momentum apparently built into every one of the human sciences" (Sedgwick, 1990, p. 42), it is increasingly as Eve Sedgwick notes:

> [T]he conjecture that a particular trait is genetically or biologically based, *not* that it is "only cultural", that seems to trigger an estrus of manipulative fantasy in the technological institutions of the culture. A relative depressiveness about the efficacy of social-engineering techniques, a high mania about biological control: the Cartesian bipolar psychosis that always underlay the nature/nurture debates has switched its polar assignments without surrendering a bit of its hold over the collective life (*ibid*., 43).

This is not to legislate against instrumental uses of 'identity' in all law reform contexts nor is it to mask law's categorical imperative that provokes, if not compels, such strategies. Rather, it is to echo Judith Butler's concern that instrumental uses of identity do "not become regulatory imperatives" (Butler, 1991, p. 16). This danger is particularly apparent in strategies that resort to (bio)logic. To return to the relationship between *S.-T. (formerly J.)* v. *J.* and *Corbett* however, the decision in *S.-T. (formerly J)* v. *J.* does not merely introduce another (bio)logical factor relevant to the question of determining legal sex. Rather, it imagines hormonal sex coupled with sex reassignment surgery to be determinative of the issue. In this regard Ward L.J. departs from *Corbett*. That is to say, in the event of 'incongruence' between sex factors it is hormones rather than state of genitalia at birth that prove decisive. While both decisions are united in sanctifying the moment of birth, and while *S.-T.* v. *J. (formerly J.)* exhibits a great deal of anxiety over the realm of the 'natural', it may be that this shift away from birth genitalia will have positive discursive effects. That is to say, it may assist, in some measure, in re-routing future legal analysis away from the horror of changing genitalia. To put it another way, movement from genitalia to hormones, as the critical (bio)logical factor in sex determination, creates the possibility for characterising sex reassignment surgery in terms of 'naturalisation' rather than 'denaturalisation'. On the other hand, it may be that for post-operative transgender persons unable to link their sex claims to the womb, Ormrod J.'s privileging of genitalia provides a better basis for imagining reform. In the following case, *W.* v. *W.*, the reformulation of legal sex is not merely imagined but is effected so as to countenance the sex claims of an intersexed person. Significantly, and in contrast to *S.-T. (formerly J.)* v. *J.*, this decision de-emphasises the relevance of sex hormones. Rather, and consistent with *Corbett*, the legal reasoning in *W.* v. *W.* priv-

ileges genitalia at birth. However, as we shall see, the decision, like *S.-T. (formerly J.)* v. *J.* and *Corbett*, invokes the 'natural' (in) order to re-sex bodies.

W. v. *W.*

The facts of *W.* v. *W.* were that the applicant, Mr W., sought a decree of nullity in respect of his marriage (of three years duration) to the respondent, Mrs W., a (male to female) intersexed woman who had undergone sex reassignment surgery, on the ground that at the date of the marriage he and the respondent were not respectively male and female.[60] As in *S.-T. (formerly J.)* v. *J.*, counsel for Mrs. W. and the presiding judge, Charles J., sought to position the facts of *W.* v. *W.* in relation to the reasoning adopted in *Corbett*.[61] However, in contrast to an emphasis on sex hormones, so evident in the judgment of Ward L.J. in *S.-T. (formerly J.)* v. *J.*, the approach adopted in*W.* v. *W.* finds consistency with *Corbett* elsewhere. While Charles J., in alluding to debate over issues of hormonal sex, expressed the view that "in my judgment I should bear in mind the points made in *S.-T.* v. *J.* in respect of the medical advances that have been made",[62] it is clear that hormonal factors are de-emphasised and ultimately considered irrelevant in the determination of Mrs. W.'s legal sex. Moreover, counsel for Mrs. W. did not advance, or seek to rely, on recent scientific developments concerning sex hormones. Rather than seek to revisit Ormrod J.'s analysis of legal sex in the light of scientific advances, the court in *W.* v. *W.* preferred to reason from the fact that Mrs. W.'s morphology exceeded, and therefore could not be determined by, the *Corbett* test. That is to say, and in contrast to J., Mrs. W.'s chromosomes, gonads, and genitalia lacked 'congruence' in terms of a binary understanding of sex. It is precisely this fact that distinguishes and of course links *W.* v. *W.* with *Corbett*.

In order to understand fully the somewhat spurious reasoning of the court, it is necessary at this point to specify precisely the nature of

60 *W.* v. *W.*, *supra* n. 2.

61 There is no reference in the judgment to the much-criticised Australian case *In the Marriage of C. and D. (falsely called C.)* [1979] F.L.R. 340 in which Bell J. held a hermaphrodite to be neither male nor female for the purposes of marriage. However, the following statement from Charles J. renders his position clear on this question: "Are people who do not satisfy the biological test in the *Corbett* case neither men or women or male or female for the purposes of marriage. This is a possible result but not one that I Reach" (*supra* n. 2, 19).

62 *Ibid.*, 7.

Mrs. W.'s body. According to the medical evidence, which Charles J. accepted, Mrs. W. had XY (male) chromosomes.[63] In relation to the other two factors in Ormrod J.'s triumvirate, it proved "extremely difficult to be conclusive"[64] given a lack of medical records and the fact of subsequent sex reassignment surgery. Nevertheless, on the basis of the medical evidence it was concluded that Mrs. W.'s gonadal sex was likely to have been male and her genitalia ambiguous at birth.[65] In other words, it was the genital factor that placed the facts of *W.* v. *W.* and the body of Mrs. W. beyond Ormrod J.'s test. Moreover, it was genital 'ambiguity' that led to her characterisation as intersex. Considerable attention was paid to Mrs. W.'s genitalia in the judgment of Charles J. Thus we learn that her external genitalia prior to surgery were "extremely small",[66] that her 'penis' was "definitely abnormal",[67] and that she had "no vaginal opening".[68] Indeed, in giving evidence as to the pre-surgical state of Mrs. W.'s genitalia, Dr. Conway expressed the view that it was "a close call"[69] as to whether the flap of skin that existed should be described as "a micro penis or a mini clitoris".[70] He concluded that if he had to classify Mrs. W.'s genitalia as either male or female he would locate them on the male side.[71] The medical evidence also indicated "some spontaneous female breast development"[72] and tended toward a diagnosis of "partial androgen insensitivity".[73]

Thus, in contrast to Ormrod J.'s view that there was never any "mistake over the sex of the child"[74] in the *Corbett* case, Charles J. in applying Ormrod J.'s test was able to conclude that there had been such a 'mistake' in the case of Mrs W.[75] Accordingly, reclassification of her sex would not involve 'falsification' of an historical record.[76] Indeed, Charles J. expressed the view that had Mrs. W. been born today "the medical decision

63 *Ibid*., 5.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.
67 *Ibid.*
68 *supra* n. 2, 6.
69 *Ibid*., 5.
70 *Ibid*.
71 *Ibid*.
72 *Ibid.*
73 *Ibid*.
74 *Corbett*, *supra* n. 6, 37.
75 *W.* v. *W.*, *supra* n. 2, 21.
76 Concern over the accuracy of birth certificates as historical records has proved to be a recurring theme of transgender jurisprudence, particularly in England and before the European Court of Human Rights (see *U.K.* v. *Rees*; *U.K.* v. *Cossey*, *supra* n. 22).

taken would have been that she should be brought up as a girl. If that decision had been made at the time of [Mrs W.'s] birth it would have been vindicated by [her] physical development as a result of her partial androgen insensitivity, her desire from an early age to live as a girl and her final choice to live as a woman".[77] While this view is highly controversial and out of step with an emerging intersex politics,[78] it is clear from the judgment that Ormrod J.'s test could not resolve the question of Mrs. W.'s sex at the moment of birth. However, and as already noted, Ormrod J. had alluded to the possibility of 'incongruence' in formulating his triumvirate test. In a move that evinces a concern to limit departure from *Corbett*, Charles J. turned to these *obiter* statements and to the following subsequent extra-judicial statement made by Ormrod J.:

> I was fortunate enough to find myself faced with a transsexual ... The difficulty would be acute in the cases of testicular feminization and testicular failure. In these cases the genital sex is unalterably female or approaching female in character yet the gonads and the chromosomes are male ... If the decision ever had to be made in a matrimonial situation I think that the genital sex would probably be decisive.[79]

Each of these passages and the interpretation placed on them by Charles J. is significant. First, it seems clear from Ormrod J.'s reasoning that any warrant for characterising as female a person whose chromosomes and gonads are male is dependent on the presence of genitalia that are "unalterably female or approaching female in character". The importance of these words seems to be underscored by Ormrod J.'s distinction between the 'abnormal' vagina of S.Y. and April Ashley's lack of a vagina pre-surgically. Yet, it is far from clear that Mrs. W.'s genitalia, the pre-surgical state of which was traced to 'partial androgen insensitivity', met this test. Rather than requiring medical assessment of genitalia as female, Charles J. preferred to reason from the 'fact' of 'ambiguity' expressing the view that "to determine the sex of [Mrs. W.] for the purpose of marriage by reference to the fact that [her] ambiguous genital sex prior to the operation fell on the male side of the line" would be "an incorrect application of [Ormrod J.'s] test".[80] In other words, the 'ambiguity' of genitalia on this account trumps the fact that the medical evidence located Mrs. W.'s

[77] *W.* v. *W.*, *supra* n. 2, 20.

[78] See *e.g.*, Kessler (1990); Triea (1994); McClintock (1997).

[79] Ormrod (1972, p. 86). In his judgment Ormrod J. explained that a person with testicular feminisation syndrome appears to be "a more or less normal female with well formed breasts and female external genitalia but with an abnormally short vagina, ending blindly, no cervix and no uterus" while in a person with testicular failure syndrome "the appearance of the external genitalia may be more doubtful, with a phallic organ which could be either a small penis or an enlarged clitoris and a short vagina" (*Corbett, supra* n. 6, 47).

[80] *W.* v. *W.*, *supra* n. 2, 17.

genitalia on the male side. On this reading, Mrs. W., despite being chromosomally male, gonadally male, and genitally more male than female, can be viewed as female. A feminist politics is clearly confronted by this idea that the category woman should function to name persons whose genitalia are 'imperfectly' formed. This move is entirely consistent with the tendency within liberal legalism to regard women's bodies as amorphous, unbounded, lacking in clear definition or, as Ngaire Naffine has put it, "as non-standard or aberrant (not-male) bodies".[81]

The references to testicular feminisation and testicular failure by Ormrod J. and the diagnosis of Mrs. W. as being 'partially androgen insensitive' are also of interest because they direct our attention to hormonal factors. The fact that Ormrod J. envisaged the re-sexing of bodies in cases of testicular feminisation and testicular failure and that Charles J. re-sexed the body of a partially androgen insensitive person in *W.* v. *W.*, might be viewed as providing a link between these cases and the judgment of Ward L.J. in *S.-T. (formerly J.)* v. *J*. That is to say, and while this argument is clearly problematic as already explained, hormonal factors may help to explain, in each instance, gender identity and the desire for sex reassignment surgery. Moreover, an emphasis on hormones perhaps serves to undermine the clarity of any distinction between intersex and transgender, a distinction that proves important in grounding the reform moment in *W.* v. *W*. On this account, any distinction becomes an effect of the degree, nature, manifestation, and temporality of the influence of sex hormones. However, it is precisely at the moment of recognising this potential continuity, and its concealment in *W.* v. *W.*, that it becomes clear that the decisions in *W.* v. *W.* and *Corbett* as to 'legal sex' have nothing, or little, to do with the development of the human body and its scientific verification. On the contrary, the concern over (bio)logic evident in these decisions proves to be a rhetorical device serving to mask what is really at stake in these marriage cases, namely the desire to assuage judicial anxiety over perceived proximity to the homosexual body. The fact that Ormrod J. privileges the genital factor in determining sex in the event of 'incongruence' and that Charles J. builds his judgment around this moment is to be accounted for in the context of this anxiety.

In short, Ormrod J., and Charles J. who followed Ormrod J.'s underlying reasoning, seek to ensure that persons to be characterised as female had genitalia at birth that are, in some important sense, opposite, and therefore 'complementary', to the male penis. It is this concern that led to considerable scrutiny and speculation about the genital region of April

[81] Naffine (1997, p. 88). This view of the female body is traceable to a body of liberal theory and perhaps most notably to the writings of Immanuel Kant.

Ashley's and Mrs. W.'s bodies at birth. For Ormrod J. the 'naturalness' of heterosexual intercourse with a man seems to require, at the very least, genitalia that are 'unalterably female or approaching female in character'. For Charles J. the mere 'fact' of genital 'ambiguity', despite the absence of a vagina, appears sufficient provided that the 'ambiguity' exists at birth. While the two judgments differ by degree they share a concern to distinguish the 'natural' from the 'unnatural', an opposition that is, of course, merely an effect of power to construct discourse, and to insulate the institution of marriage from the realm of the 'unnatural'. It is especially significant that in both judgments thinking about 'natural' heterosexual intercourse leads to the invocation of an intersex/trangender dyad. It is curious why this distinction is insisted upon. After all, the heterosexual liaison that Ormrod J. and Charles J. imagine is only possible on the facts of *Corbett* and *W.* v. *W.* after sex reassignment surgery. The difference appears to lie in the relationship between sex reassignment surgery and 'nature' as it is constructed in the two decisions. Thus, the willingness to characterise Mrs. W.'s post-operative genitalia as 'natural' arises out of viewing her surgery in terms of a process of 'naturalisation' to be contrasted with the process of 'denaturalisation' that culminated in the construction of April Ashley's "artificial cavity".[82] This move is possible only through viewing intersexed bodies as nature's 'mistake'. In this regard recognition of the sex claims of Mrs. W. proves highly problematic for an intersex politics. It is this view of a 'mistake' in nature at birth that enables Charles J., like Ormrod J. before him with regard to the S.Y. decision, to differentiate forms of 'unnaturalness' and to recast them along temporal lines. In other words, it is the 'fact' that Mrs. W.'s genitalia were 'ambiguous' at birth that rendered possible the positioning of her vagina within the limits of the 'unnatural' that the law can accommodate.

However, and by way of re-emphasis, the trope of the '(un)natural' in the judgment of Charles J. cannot be reduced to the signification of 'error' and its correction through sex reassignment surgery. Rather, the fact that the 'unnatural' is differentiated by degree and that not every degree of 'unnaturalness' can be rescued from that realm through surgical intervention directs our attention to something else, something more, namely judicial anxiety over proximity to the homosexual body. Moreover, it is precisely in order to insulate intersexed bodies from homosexuality that an intersex/transgender dyad is instantiated. Indeed, Charles J., and Ormrod J. before him, went to considerable length to draw this distinction. Here nature, albeit in 'error', is to be contrasted with the artifice of transgender and the contrast serves to conflate transgender with homosexuality.

[82] *Corbett*, *supra* n. 6, 49.

However, the very repetition of the distinction reveals its vulnerability,[83] as does Charles J.'s concern over the "dangers in analysing too meticulously or theoretically the essential ingredients of normal sexual intercourse".[84] Again, as in *S.-T. (formerly J.)* v. *J.*, legal anxiety generated around an imagined scene of penile-vaginal penetration would appear to have more to do with law's ability to characterise it as 'natural' and heterosexual than whether or not it is ever actualised.

Indeed, the coupling of intersex with heterosexuality itself produces a degree of judicial anxiety. Thus in commenting on a relationship Mrs. W. had in the mid- to late 1960s with a man from Manchester, Charles J, expressed the view that it was "at least in part of a homosexual nature".[85] While the reason for this characterisation is not rendered explicit it appears to be based on either Mrs. W.'s evidence of, or judicial assumptions as to, penile penetration of her anus. This interpretation is supported by passages from Ormrod J.'s judgment, which Charles J. chose to cite, concerning the 'homosexual' pre-operative sexual practices of April Ashley.[86] The words 'at least in part of a homosexual nature' are revealing in another regard, one that ultimately enables Charles J. to hold the transgender/intersex dyad in place. That is to say, pre-operative anal intercourse, or the possibility of its enactment, is characterised as bearing a different relation to intersex and transgender. It is to this point that the judgment of Charles J. ultimately leads. The point is captured in Charles J.'s reiterated statement that Mrs. W. "would never have been able to have sexual intercourse as either a man or a woman without surgical intervention".[87] It is this inability existing in nature, a factor that of itself serves to sanitise the intersexed body, to be contrasted with the pre-operative heterosexual capacity of transgender persons, which assumes significance. In contrast to the post-operative transgender person, whose surgery represents a move against nature, sex reassignment surgery in the case of an intersexed person is depicted as a necessary step in the 'naturalisation' and 'heterosexualisation' of the body. This characterisation of surgery as necessary, as a prerequisite to 'natural' heterosexual intercourse, leads to a view of intersex as deserving. In contrast transgender desire, including desire for sex reassignment surgery, much like homosexual desire with which it is so readily conflated, is scripted as willful rather than given in nature.

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83 Butler (1993, p. 10).
84 *W.* v. *W.*, *supra* n. 2, 18.
85 *Ibid.*, 2.
86 *Ibid.*, 8.
87 *Ibid.*, 18.

CONCLUSION

The decisions in *S.-T. (formerly J.)* v. *J.* and *W.* v. *W.* might, at first glance, be viewed as representing a thaw in English transgender jurisprudence. In the former case, particularly in the judgment of Ward L.J., the possibility of moving beyond *Corbett* is entertained. That is to say, the possibility that 'psychological and anatomical harmony' might replace chromosomal, gonadal, and genital congruence at birth as the test for determining sex for legal purposes is given serious consideration. Moreover, the judgment of Ward L.J., given his particular reliance on the New Zealand decision of *Attorney-General* v. *Otahuhu Family Court*, appears to imagine the re-sexing of bodies irrespective of the capacity for heterosexual intercourse. In this regard, not only is the re-sexing of bodies imagined but rather the extent of reform imagined, with the exception of New Zealand, surpasses all common law jurisdictions that have departed from *Corbett*. In *W.* v. *W.*, reform is not merely imagined. Rather, female status is conferred on an intersexed person assigned male at birth whose morphology exceeded Ormrod J.'s test for determining sex.

However, on closer inspection it is apparent that both of these recent decisions are arrived at within a framework established by *Corbett*. That is to say, both decisions, while privileging different factors in the determination of sex, insist on a (bio)logical account and on the centrality of birth as the governing moment. In this regard the decisions do little, if anything, to advance transgender law reform. Moreover, the particular constructions of sex in *S.-T. (formerly J.)* v. *J*. and *W.* v. *W.* share more with *Corbett* than their formal grounding in biology. For resort to (bio)logic appears to be an effect of anxiety over the perception of proximity to the homosexual body. In *S.-T. (formerly J.)* v. *J.*, this manifests itself in the discomfort surrounding judicial contemplation of the vaginaed male body, in the endorsement of the shift in *Otahuhu* from heterosexual function to bodily aesthetics as the rationale for a legal requirement of sex reassignment surgery, and in the view that failure to recognise the sex claims of post-operative transgender persons is to continue to facilitate marriages which are '[t]o all outward appearances' of a gay and lesbian character. It is homosexual/transgender conflation that accounts, in large measure, for the importance of sex reassignment surgery and hormonal 'truth' to the reform imagined by Ward L.J. In *W.* v. *W.*, anxiety over proximity to the homosexual body manifests itself through the instantiation of a transgender/intersex dyad. This occurs through the deployment of a nature/artifice distinction whereby sex reassignment surgery, and any subsequent sexual intercourse, is presented as both the realisation (in the intersex context) and the denial (in the transgender context) of nature.

It would seem that the spectre of *Corbett* and the homophobia of law that underwrites that decision are likely to continue to haunt English transgender jurisprudence in the foreseeable future.

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